UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1258

NUCLEAR ENERGY INSTITUTE, INC.,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

Consolidated with

01-1268, 01-1295, 01-1425, 01-1426, 01-1516
02-1036, 02-1077, 02-1116, 02-1179, 02-1196
03-1009, 03-1058

ON PETITIONS FOR REVIEW OF FINAL RULES
OF THE ENVIRONMENTAL PROTECTION AGENCY

OPPOSITION OF THE STATE OF NEVADA AND THE NATURAL RESOURCES DEFENSE COUNCIL, PUBLIC CITIZEN, CITIZEN ALERT, NEVADA NUCLEAR WASTE TASK FORCE, NEVADA DESERT EXPERIENCE, CITIZEN ACTION COALITION OF INDIANA, AND THE NUCLEAR INFORMATION AND RESOURCE SERVICE TO THE MOTION OF THE NUCLEAR ENERGY INSTITUTE, INC. TO STAY THE MANDATE

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September 20, 2004

PRELIMINARY STATEMENT

The State of Nevada and the Natural Resources Defense Council ("NRDC"), *et al.*, respectfully oppose the motion of the Nuclear Energy Institute, Inc., ("NEI") for a stay of the mandate with respect to two of the rulings issued by this Court in *Nuclear Energy Inst., Inc. v. Environmental Protection Agency,* 373 F.3d 1251 (D.C. Cir. 2004) ("*NEI*"). One of those two rulings vacated an Environmental Protection Agency ("EPA") regulation insofar as it established a 10,000-year "compliance period" for measuring the safety of the high-level nuclear waste repository proposed to be built at Yucca Mountain, Nevada. *See id.* at 1266-73. The second of the two rejected a challenge brought by NEI to a separate groundwater protection standard in those same regulations. *See id.* at 1278-80. However, NEI acknowledges that the second ruling could not by itself justify a stay of the mandate. Motion at 8.

These rulings were part of a unanimous opinion by a panel of this Court. Rehearing by the panel and rehearing *en banc*, sought by NEI alone, were promptly and summarily denied. (No member of the Court requested a vote on the denial of rehearing *en banc.*) *See* Orders Denying Petitions for Rehearing and for Rehearing *En Banc, Nuclear Energy Inst., Inc. v. Environmental Protection Agency*, No. 01-1258 (Sept. 1, 2004). None of the three federal agencies involved in the Yucca Mountain litigation have seen fit to seek a stay of the mandate. Moreover, the EPA, the agency obviously most affected by the overturning of its 10,000-year compliance standard, has announced that it will "not seek further court review" and "intends to work to develop an appropriate regulatory response that complies with the Court opinion and which is fully protective of human health and the environment."

Benjamin Grove, *EPA Won't Appeal Radiation Standard,* LAS VEGAS SUN, Sept. 9, 2004 (appended as Attachment A)[1]; E-mail from Dave Ryan, EPA Washington Headquarters Press Officer, to Benjamin Grove, Las Vegas Sun Washington Bureau (Sept. 7, 2004, 5:23 P.M. eastern) ("EPA Statement") (appended as Attachment B).

With the case in this posture, the central theme of NEI's stay request, that the interest of its members and federal agencies in expediting completion of the Yucca Mountain repository requires a stay of the mandate, is hollow at best. No harm, let alone substantial harm, will befall anyone in the absence of a stay; and NEI offers no serious basis for a grant of *certiorari* by the Supreme Court, nor any good cause for the stay it seeks.

ARGUMENT

A. No Substantial Harm Will Result in the Absence of a Stay.

1. By beginning its Motion with the claim merely that it intends to raise "substantial questions" before the Supreme Court, Motion at 2, NEI bypasses what this Court has taught is NEI's threshold obligation -- to demonstrate that substantial harm will result if the mandate is not stayed. *See United States v. Microsoft Corp.*, 2001 WL 931170, at *1 (D.C. Cir. 2001). *See also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J.) ("An applicant's likelihood of success on the merits need not [even] be considered, . . . if the applicant fails to show irreparable injury from the denial of the stay."). This NEI has not done.

According to NEI, without a stay, "there will be risk that the Yucca Mountain repository will be delayed without justification or that there will be further

[1] Also available at http://www.lasvegassun.com/sunbin/stories/text/2004/sep/09/517482892.html.

litigation." Motion at 12. NEI also adverts to "[c]onsiderations of administrative efficiency and . . . the expeditious achievement of Congress's substantive goal," *id.* at 2, and the ability of the Supreme Court "to weigh in at all on this critical national problem." *id.* at 4, as somehow justifying a stay. Putting aside for the moment the fact that other developments, unrelated to these consolidated cases, will independently delay the Yucca Mountain licensing proceedings for quite some time, it is simply impossible for NEI to convincingly maintain that a stay is needed to avoid "substantial harm" in the context of these consolidated cases. To the contrary, there is significant justification for allowing the appropriate regulatory process to proceed unimpeded. EPA, the agency charged by Congress with achieving the "substantive goal" relevant here – promulgation of a compliance period in which to measure the safety of the repository – has already determined that it will not further appeal the panel's decision in this case. EPA has also indicated it will move forward with a rulemaking, attempting to establish a new compliance period in conformity with this Court's reading of the governing statute and with the demands of "human health and the environment." EPA Statement. Certainly the judgment of EPA that any public interest in the completion of a nuclear waste repository is not jeopardized by complying with this Court's decision is a far more credible gauge of any risk of harm than the point of view of a private party like NEI. EPA's position undermines NEI's self-serving notion that its motion is needed to avoid harm to "federal agencies." Motion at 12.

The only putative harm to the interests of NEI itself suggested in this Motion is a financial one, apparently arising out of NEI's costs for "NRC rulemaking

activities." Motion at 12. Yet it is elementary that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974);*see also Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Not only are such expenses not a justification for a stay of the mandate, they would seem to be the kind of expenses that NEI may have brought upon itself anyway. NEI's Petition for Review sought "vacation of the Yucca Mountain Rule and a declaration that EPA must issue a new rule consistent with applicable law and the Court's ruling . . . ." Petition for Review, *Nuclear Energy Inst., Inc. v. United States Environmental Protection Agency*, No. 01-1258, at 2 (D.C. Cir. filed June 6, 2001). Thus, the whole reason NEI launched this litigation was to overturn EPA's regulations and compel the agency to undertake a new rulemaking, thereby producing a delay in the Yucca Mountain process. That is precisely what will now occur, though obviously for reasons different from what NEI would have hoped.

2. Moreover, NEI goes out of its way to underscore that its stay would not prevent either EPA or the Nuclear Regulatory Commission ("NRC") from "proceed[ing] with further rulemaking in accordance with the Court's decision." Motion at 11. So let the posture of its Motion be clear: NEI plans to seek *certiorari* challenging this Court's decision; EPA plans to undertake a new rulemaking premised on this Court's decision; and NEI's proposed stay would not affect either of these developments in the slightest. Thus, NEI's stay request is not simply unnecessary to avoid any harm, but an utterly useless exercise.

3. NEI condemns as harmful only that particular delay it terms is "without justification." Motion at 12. That formulation may serve as NEI's basis for distinguishing the delay granting NEI's Petition would have caused, as noted above, from the delay about which it now complains. However, the notion of an "unjustified" delay is simply repetition of the merits of the case, as the six pages NEI devotes to merits arguments (out of a 13-page motion) illustrates. *See* Motion at 4-10. NEI's mere disagreement with this Court's opinion cannot serve as the basis for a claim that this Court's mandate will cause substantial harm to anyone.

4. By indicating "DOE is now finalizing its license application for submission in December 2004," Motion at 3-4, and then arguing "[w]ithout a stay, there will be risk that the Yucca Mountain repository will be delayed without justification," *id.* at 12, NEI implies that a stay of the mandate will somehow facilitate the submission of an application in December, 2004. This is in fact not the case. Under the procedural rules of the NRC, DOE is required to make numerous Yucca Mountain repository safety documents electronically available to the NRC, the State of Nevada, and other potential parties "no later than six months in advance of submitting its application." 10 C.F.R. § 2.1003. On June 30, 2004, in anticipation of submitting an application in late December, DOE purported to certify to the NRC that it had complied with this requirement, but on August 31, 2004, a three-member Atomic Safety and Licensing Board appointed by the NRC issued a carefully reasoned 54-page decision holding that "DOE has not made all of its documentary material available" and striking DOE's certification from the record. *See U.S. Department of Energy (High Level Waste Repository: Pre-Application*

Matters), Docket No. PAPO-00 (NRC Atomic Safety and Licensing Bd. August 31, 2004).[2] While DOE has appealed one aspect of this decision to the NRC, it has not asked the NRC to reinstate its certification or to find that it complied in good faith with the document production requirement. DOE therefore cannot lawfully submit an application this year and will be unable to submit any application at any time (in 2005 or later) until six months after it has screened and made available over four million more documents. Thus, a decision on *certiorari* will have been made by the Supreme Court long before any Yucca licensing proceeding can even convene. In other words, no delay is even possible in the absence of a stay, let alone inevitable.

B. NEI's *Certiorari* Petition Will Not Present a Substantial Question.

1. There are two components expressly set out in FED. R. APP. P. 41 (d)(2)(A) for the kind of showing required to justify a stay pending a petition for *certiorari*. First, the *certiorari* petition must present a "substantial question." To meet this requirement, NEI makes two arguments. At the outset, NEI contends that "[t]his case involves a matter of great national importance: the creation of a national repository for spent nuclear fuel and high-level radioactive waste." Motion at 2. The creation of such a repository is indeed a *policy* issue of the first rank, but the precise question here is *not*, as NEI seems to put it, whether the Supreme Court will have the opportunity to "weigh in at all on this critical national problem." *Id.* at 4. The Supreme Court simply does not have a roving commission to "weigh in" on "national problems." NEI does contend that the issues it will raise in its *certiorari* petition will "have a significant bearing on the cost and schedule of the repository,"

[2] Available at http://www.state.nv.us/nucwaste/news2004/nrc/nrc040831aslb.pdf.

id., but even assuming *arguendo* that this were true, it falls far short of the kind of substantial question that can justify a stay pending *certiorari*. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE, § 17.19, at 793 (8th ed. 2002) ("SUPREME COURT PRACTICE") ("[A]n applicant for a stay must show not only that there is a reasonable possibility that four Justices will vote to grant certiorari, but also 'that there is a fair prospect that a majority will conclude the decision below was erroneous.'").

NEI makes no effort to adduce any of the traditional grounds for a grant of a petition for *certiorari*. The Supreme Court grants such a petition only for "compelling reasons," and the "character of the reasons the Court considers" commonly involves not only the importance of the question, but also some conflict in resolving the question among lower courts, or a conflict between the court of appeals' decision and the relevant precedents of the Supreme Court. *See* SUP. CT. R. 10 ("Considerations Governing Review on Certiorari"). This Court's resolution of the 10,000-year compliance period, a straightforward matter of statutory construction, simply has not been part of any conflicts in the lower courts or among precedents requiring the attention of the Supreme Court. Moreover, given that EPA itself sees no need for further review of this Court's decision, this case cannot pose a question so important that it will warrant Supreme Court review on that ground alone. *See* SUPREME COURT PRACTICE, § 4.11, at 244 ("Except where a governmental or public body is a litigant and is able to demonstrate importance in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as

worthy of further consideration."). By contrast, NEI's speculation that its *certiorari* petition will have a "significant bearing" on the "cost and schedule of the repository," Motion at 4, is so vague and so lacking in precise, hard detail (an absence made particularly apparent by this statement's reliance on purported "cost"), as to amount to a mere rhetorical flourish undermined by the facts as described above. In short, NEI fails entirely to make a clear articulation meeting the Supreme Court's rigorous grounds for *certiorari*.

2. The second reason that NEI claims its *certiorari* petition will present a "substantial question" is, again, that NEI believes that this Court's decision is in error. *See* Motion at 4-10. Nevada need not repeat the thoroughly briefed and argued merits of this action to note the failure of NEI's position to support its present motion. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions. . . . Hence, the Court generally will not grant certiorari just because the decision below may be erroneous." SUPREME COURT PRACTICE, § 4.17, at 255. NEI's mere disagreement with this Court's unanimous opinion does not raise any substantial question for *certiorari* that can justify a stay of the mandate.[3]

[3] One new-found disagreement with EPA that NEI raises in this Motion that it did not raise at all in briefing before this Court is its claim that this Court's interpretation of the governing statute effectively creates a non-delegation issue. *See* Motion at 7. The Court's decision on the 10,000-year compliance period issue was a direct consequence of Nevada's challenge to that provision in EPA's regulations. *See NEI*, 373 F.3d at 1266. Regardless of the merits of a non-delegation argument here, the possibility of making such an argument has been apparent from the outset of briefing, and easily could have been raised when this Court was considering the merits of these cases. Neither NEI, nor any other party, made this argument before, and it is completely inappropriate for NEI to attempt to raise this argument now. *See United States ex rel. Totten v. Bombardier Corp*, 2004 WL 1906880, at *8 (D.C. Cir. Aug. 27, 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived."). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to "allow a petitioner to assert new substantive arguments attacking . . . the

C. There Is No Other Good Cause to Stay the Mandate.

The second component required to justify a stay pending a petition for *certiorari* is "good cause for a stay." FED. R. APP. P. 41 (d)(2)(A). NEI points to the harm it claims its stay will not cause, *see* Motion at 10-11, and the harm it claims its stay will avert, *id.* at 12-13, as this "good cause" for a stay of the mandate. We have addressed both of these claims above, and will not repeat our rejoinder here.

At bottom, it is impossible to see what good of any kind could be served by the stay NEI seeks. EPA plans to proceed with a rulemaking premised on this Court's decision. NEI has already failed to secure rehearing by either the panel or the full Court, and certainly has not offered any convincing arguments that the Supreme Court is likely to grant *certiorari*, much less reverse this Court's decision. No additional delay of any kind in the Yucca licensing proceeding or schedule will result in the absence of a stay. Indeed, a stay could only cloud EPA's plan to proceed with rulemaking to fulfill its responsibilities in the repository process.

CONCLUSION

For the foregoing reasons, the State of Nevada and the NRDC, *et al.*, respectfully submit that NEI's Motion to Stay the Mandate Pending Timely Filing and Disposition of Petition for Writ of *Certiorari* is without merit and should be denied.

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judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it").

Respectfully submitted,

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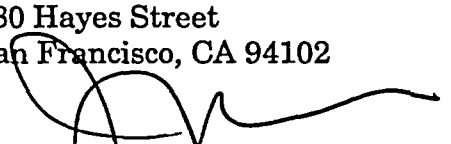

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DATED: September 20, 2004

Attachment A

Benjamin Grove,
EPA Won't Appeal Radiation Standard,
Las Vegas Sun, September 9, 2004

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Las Vegas SUN

September 09, 2004

EPA won't appeal radiation standard

By Benjamin Grove
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SUN WASHINGTON BUREAU

WASHINGTON -- The federal government will not appeal to the U.S. Supreme Court to challenge a recent legal setback to Yucca Mountain, the Environmental Protection Agency said Tuesday.

The EPA will comply with the ruling from the U.S. Court of Appeals for the District of Columbia Circuit, which on July 9 affirmed a Nevada appeal, the EPA said in a statement.

The state had challenged the proposed nuclear waste repository's radiation standard, established by the EPA in 2001. The court ruled that the standard aimed at containing radiation at the site for 10,000 years violated federal law by disregarding far stricter standards recommended by the National Academy of Sciences.

Yucca critics had hailed the ruling, which formally takes effect today, as a significant victory that throws the future of the project into question.

The EPA accepts that ruling and now "intends to work to develop an appropriate regulatory response that complies with the court opinion," the EPA statement said. EPA spokesman John Millett today declined to discuss whether the EPA will now begin the process of formally setting a new standard.

As part of a massive lawsuit, the state of Nevada had challenged Yucca on a long list of issues but prevailed on only one -- the radiation standard. "Because the United States substantially prevailed in the court's decision, it has elected not to seek further court review," the EPA statement said.

The court's opinion stated that the EPA's 10,000-year radiation standard disregarded National Academy science, which called for a far stricter standard of several hundred-thousand years, or even as much as a million years.

That would be a difficult -- critics say impossible -- standard for the Energy Department to meet. The department manages Yucca and intends to apply for a license to construct the underground nuclear waste dump by the end of the year.

It is not clear how the department could ever prove to the Nuclear Regulatory Commission that Yucca could meet standards stricter than 10,000 years. The NRC would license and regulate Yucca.

"The problem for DOE (the Energy Department) now is: Is that the death of the project?" said Martin Malsch, a lawyer with Egan & Associates, which has led a legal battle against Yucca for Nevada.

But there is another option for the Energy Department -- Congress.

Pro-Yucca lawmakers could step in to legislate a standard that they believe Yucca could meet.

So far, if there is a such a movement afoot in Congress, the players are keeping it quiet. The Energy Department, nuclear industry leaders and pro-Yucca lawmakers do not appear mobilized in any immediate effort.

"We are not aware of anyone advancing proposals for legislation," said Sid Smith, spokesman for Sen. Larry Craig, R-Idaho, a leading pro-Yucca senator.

Rep. Joe Barton, R-Texas, chairman of the House Energy and Commerce Committee, a Yucca leader in the House, also does not have immediate plans to introduce radiation standards legislation, a Barton aide said today. The panel has jurisdiction over Yucca issues.

A spokesman for Sen. Pete Domenici, R-N.M., chairman of the Senate committee with jurisdiction over Yucca issues, also said he was not aware of efforts to push a new Yucca standards bill.

Lawmakers returned to Washington this week after a month-long break. They set an Oct. 1 target adjournment date and have a number of issues competing for their attention, including spending bills. So there may be little appetite to take up Yucca Mountain legislation before the election, especially given that the project is politically charged in battleground state Nevada.

The Nuclear Energy Institute, the leading nuclear power industry lobby group, is not leading an effort to push legislation, NEI spokesman Mitch Singer said. But he added that NEI is always in communication with Congress about Yucca issues, "including the radiation standard."

Meanwhile NEI, which lost its first appeal on the radiation standards issue last week, is mulling a Supreme Court appeal.

It's not clear if the Bush administration will throw its weight behind an effort to legislate a radiation standard in Congress. President Bush has not taken a public stand on Congress legislating a new standard.

During an August appearance in Nevada, Bush said, "I will allow this process to be appealed to the courts and to the Nuclear Regulatory Commission. And I will stand by the decision of the courts and the Nuclear Regulatory Commission."

Democratic challenger John Kerry has said he would veto any attempt to change the standard in an effort to keep Yucca on track.

White House spokesman Ken Lisaius referred questions about the radiation standards to the Energy Department. He said he was not aware of any high-level White House officials working with the department to goad Congress into action.

Nevada's lawmakers in Congress likewise have not heard about pro-Yucca lawmakers shopping new Yucca legislation in the Capitol, their aides said.

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Las Vegas SUN main page

Questions or problems? Click here.

Attachment B

E-mail from Dave Ryan, EPA Washington Headquarters Press Officer,
to Benjamin Grove, (September 7, 2004, 5:23 PM EST)

From: Ryan.Dave@epamail.epa.gov
Sent: Tuesday, September 07, 2004 5:23 PM
To: benjamingrove@yahoo.com
Subject: Yucca Statement

Because the United States substantially prevailed in the Court's decision, it has elected not to seek further court review. The court ruled against almost all of the challenges to the NRC's and EPA's regulations and dismissed all challenges to the siting process at Yucca Mountain, including those challenges directed at the law enacted by Congress that specifies Yucca Mountain as the repository site. On the only issue in which the Court disagreed with the position of the United States, the selection of a 10,000 year compliance period, the Environmental Protection Agency intends to work to develop an appropriate regulatory response that complies with the Court opinion and which is fully protective of human health and the environment.

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Certificate of Service

The attached Opposition of the State of Nevada and the Natural Resources Defense Council to the Motion of the Nuclear Energy Institute, Inc. to Stay the Mandate has been served, via first class mail, postage prepaid, September 20th, 2004.

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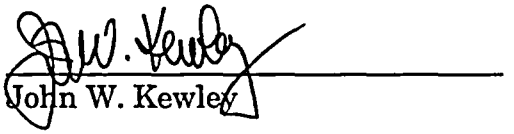

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